No. 16107.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD C. HOY, District Director of Immigration and Naturalization Service, Los Angeles, California,

Appellant,

vs.

MANUEL MENDOZA-RIVERA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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Jurisdiction.

The jurisdictional facts are set forth in Appellant's Opening Brief (p. 1) and are adopted by Appellee.

Statement of the Case.

The statement of the case is adequately set forth in Appellant's Opening Brief (pp. 2-3).

Question Presented.

The question presented as stated in Appellant's Opening Brief (p. 3) is correct, except that Appellant inadvertently stated that the applicable section of the law pertaining to the question presented is Title 8 U. S. C. Sec. 1251(a)(1), whereas the applicable section is Title 8 U. S. C. Sec. 1251(a)(11).

ARGUMENT.

I.

Public Law 728 and House Report No. 2388, June 19, 1956, Accompanying H. R. 11619, Shows That Congress Treated "Marihuana" as a Substance Not to Be Included Within the Term "Narcotic Drugs."

Throughout Public Law 728, 84th Congress, 2nd Session, Congress was careful to make a distinction between the terms "narcotic drugs" and "marihuana" and where reference is made to both the expression "narcotic drugs and marihuana" is used. For example, Sections 101 and 102 of Title 1 pertain to marihuana only, whereas Section 103 of Title 1 pertains to narcotic drugs and marihuana, and both terms are used.

Appellant, in his Opening Brief (at p. 5) states that it must be conceded that nowhere in Public Law 728 does Congress expressly define "narcotic drugs" or "marihuana." However, Section 201 of Title 2 of Public Law 728 amends Part I of Title 18 of the United States Code by inserting after Chapter 67 a new Section 1407. This new section refers to ". . . narcotic drugs as defined in Section 4731 of the Internal Revenue Code of 1954, as amended . . ." Congress has defined "narcotic drugs," omitting "marihuana" from its definition (26 U. S. C. 4731) and has defined "marihuana" without including in that definition any substance included in its definition of "narcotic drugs" (28 U. S. C. 4761). The Internal Revenue Code of 1954, subchapter A of Chapter 39, is entitled "Narcotic Drugs And Marihuana." Part I of this subchapter pertains to narcotic drugs, Part II pertains to marihuana, and Part III contains miscellaneous provisions relating to narcotic

drugs and marihuana. The Food and Drugs Act, Title 21 U. S. C. 171(a), for its purposes in treating of the subject narcotic drugs, defines the term "narcotic drugs" but does not include marihuana in the definition.

House Report No. 2388, 84th Congress, 2nd Session, June 19, 1956, accompanying H. R. 11619, reported in No. 13, 1956 *U. S. Code Congressional And Administrative News,* at pages 4288-4329, distinguishes between the terms "narcotic drugs" and "marihuana," by referring to "marihuana" alone, for example, at pages 4288 and 4289, and to "narcotic drugs and marihuana," page 4289, and to "Federal narcotic or marihuana laws," page 4289. The Conference Report, No. 2546, 84th Congress, 2nd Session, June 29, 1956, of the two Houses, accompanying H. R. 11619, reported in *U. S. Code Congressional And Administrative News, supra,* at pages 4329 to 4336, distinguishes between the two terms, as does the House Report.

Appellant, in his Opening Brief, cites 42 U. S. C. 201(j) and 49 U. S. C. 787(d) as evidence that Congress included "marihuana" in its definition of "narcotics" or "narcotic drugs" for civil purposes. However, as to the first citation, marihuana was included in the definition as a matter of convenience and to avoid repetition in the treatment of the subject of the Public Health Service, and the same is true as to the second citation, in the treatment of the subject of contraband articles and, as to the second citation, it was acknowledged that "narcotic drug" and "marihuana" have each been defined separately by the Congress as hereinabove stated.

It is evident that Congress, in its treatment of the terms "narcotic drugs" and "marihuana" distinguished between the two, passed legislation on one without the

other, and in considering both terms at the same time referred to both. It is contended that if Congress had contemplated including marihuana with narcotic drugs in the provisions of Title 8 U. S. C. Section 1251(a)(11) pertaining "to the illicit possession" it would have done so clearly and concisely as Congress has done in other instances in enacting legislation where the two terms are considered together.

II.

Congress Could Not Have Intended That 8 U. S. C. 1251(a)(11) "Possession of Narcotic Drugs" Incorporate State Criminal Statutes' Definition of "Narcotic Drugs."

Appellant points out that Appellee was convicted of possession of marihuana in violation of Section 11500 of the Health and Safety Code of California, and that Section 11001 of that same Code includes marihuana within the meaning of the term "narcotics." Appellant then takes the position that the reason Congress did not expressly define "narcotic drugs" in 8 U. S. C. 1251(a)(11), ". . . is that full effect could thereby be given to the various state statutory definitions thereof," and cites *United States v. Eramdjian,* 155 Fed. Supp. 914, 931 (S. D. Cal. 1957) (page 8, Appellants Opening Brief). However, if Congress intended to rely on a state's definition of narcotic drugs, the whole purpose of 8 U. S. C. 1251(a)(11) could be defeated. It is conceivable that a state could include numerous substances unrelated to any concept of the term "narcotic drugs" or the term "narcotic" for the purpose of establishing a criminal section pertaining to the possession of substances which the state felt should be declared unlawful. An alien convicted of the illicit possession of such a sub-

stance could then be deported from the United States if Appellant's contention is correct. Certainly Congress could not have intended that the Federal statute in question should be dependent on state statutory definitions of the term "narcotic drugs."

The United States Supreme Court, in its opinion in *Jerome v. United States,* 318 U. S. 101, 104, states:

> "At times it has been inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law. . . . But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide (*United States v. Pelzer,* 312 U. S. 399, 402) and at times on the fact that the federal program would be impaired if state law were to control."

See also, *Textile Workers v. Lincoln Mills,* 353 U. S. 448, 457; and *Board of Commissioners v. United States,* 308 U. S. 343, 351-352.

Conclusion.

In conclusion, Appellee respectfully submits to this Honorable Court:

1. That Congress has distinguished between the terms narcotic drugs and marihuana and therefore could not have intended to include a violation of law relating to the illicit possession of marihuana as a violation of law relating to the illicit possession of narcotic drugs under 8 U. S. C. 1251(a)(11) as amended by Public Law 728; and

2. That Congress did not intend that the term narcotic drugs should depend upon state statutory definitions; and

3. That the conviction of the mere possession of marihuana is not a basis for an order of deportation under this statute.

The judgment of the trial court should therefore be affirmed.

Respectfully submitted,

HARLIN M. FULLER,

Attorney for Appellee.